IN THE SUPREME COURT OF MISSOURI

Case No. SC87841

ELOIS SNODGRASS, for herself and on behalf of her deceased minor son, TERRY KEOWN,
Appellant,

v.

MARTIN & BAYLEY, INC. d/b/a HUCK'S CONVENIENCE FOOD STORE
Respondent.

Appeal from the Circuit Court for the Twenty-Second Judicial Circuit
Case No. 052-01007
Honorable Steven R. Ohmer

BRIEF OF *AMICUS* MISSOURI PETROLEUM MARKETERS AND CONVENIENCE STORES ASSOCIATION IN SUPPORT OF RESPONDENT MARTIN & BAYLEY, INC.

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STATEMENT OF INTEREST OF AMICUS CURIAE

MPMCSA is a statewide trade organization whose membership includes approximately 300 independent motor fuel marketers and approximately 1,500 convenience stores in Missouri. A sizeable majority of the members of MPMCSA are licensed for the sale of intoxicating liquors by the State of Missouri. For most, these sales are limited to the sale of beer. Nationally (although Missouri statistics are consistent with national statistics), approximately 73 percent of all convenience stores sell beer; 35 percent sell wine; and 17 percent sell packaged liquor. *Beer Sales at Convenience Stores*, National Association of Convenience Stores, http://www.nacsonline.com/NACS/Resource/PRToolkit/FactSheets/prtk_fact_beer.htm. These percentages are also representative of MPMCSA's members. The convenience store members of MPMCSA are not engaged, however, in the sale of liquor by the drink for consumption on the premises. As this shows, convenience stores are directly affected by the challenge to the validity of § 537.053, RSMo. being made in this appeal.

MPMCSA is organized for the purpose, among other things, of advocating and promoting the welfare of its members in relation to the legal environment in which they operate, and promoting the interests of its members in the State of Missouri. MPMCSA expended funds and lobbied on behalf of its members related to the enactment of the present version of § 537.053, RSMo., under challenge here.

MPMCSA continues to expend funds and effort in monitoring, overseeing and opposing any changes to that section and/or the broadening of dram shop liability in Missouri which would adversely affect the interests of its members.

MPMCSA is appearing here in its own behalf and on behalf of its members. It seeks to present the viewpoint and interest of those retail motor fuel retailers and convenience stores which are licensed to sell beer and packaged liquor as part of their operations and which would be directly and adversely affected by Appellant's proposed interpretation of § 537.053, RSMo., and the challenge to its validity. In addition, because of the various types and sizes of convenience stores which are members of MPMCSA, its state-wide scope, and its knowledge of the day-to-day operations of its members, MPMCSA is able to present a broader, more detailed perspective on the effect of the issues in this case that the other parties to the action cannot present. As such, no other party represents the same interest as MPMCSA.

This brief is being filed with the consent of the parties.

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions

Statutes:

Other Authority:

ARGUMENT

I.

SECTION 537.053, RSMo., PROVIDES FOR A LIMITED DRAM SHOP LIABILITY THAT DOES NOT INCLUDE LIQUOR LICENSEES WHO SELL PACKAGED LIQUOR FOR SALE OFF-PREMISES (RESPONDS TO SECTION IV C OF APPELLANT'S BRIEF)

(Responds to Section IV C of Appellant's Brief)

Appellant challenges the trial court's action on three bases: § 537.053 is invalid under Article I, § 14 of the Missouri Constitution (Open Courts clause); § 537.053 is invalid under Article I, § 2 of the Missouri Constitution (Equal Protection clause); and § 537.053 allows for a civil claim against a commercial seller of intoxicating liquor for consumption off the premises relating to a sale to a minor. As both the Open Courts clause and Equal Protection clause challenges are controlled by the construction of § 537.053, the most logical starting point is Appellant's statutory construction challenge.

Relevant to the cause of action provided by § 537.053, the statute states:

> 1. Since the repeal of the Missouri Dram Shop Act in 1934 (Laws of 1933-34, extra session, page 77), it has been and continues to be the policy of this state to follow the common law of England, as declared in section 1.010, RSMo, to prohibit dram shop liability and to follow the common law rule that furnishing

alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons.

2. Notwithstanding subsection 1 of this section, a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink for consumption on the premises when it is proven by clear and convincing evidence that the seller knew or should have known that intoxicating liquor was served to a person under the age of twenty-one years or knowingly served intoxicating liquor to a visibly intoxicated person.

§ 537.053, RSMo. In addition to the language above, subsection 4 provides that nothing in the statute is to "be interpreted to provide a right of recovery," § 537.053.4, RSMo., and subsection 5 refers to "an action brought pursuant to subsection 2 of this section." § 537.053.5, RSMo.

There is only one interpretation to be made from the express language of § 537.053 and that is, as to potential defendants, a "dram shop" cause of action exists only as against a person licensed to sell intoxicating liquor by the drink for consumption on the premises. To interpret this language in any other way completely reads the language of limitation out of the statute. Appellant recognizes this in her brief, describing subsection two as permitting some dram shop injury claims but not claims against sellers of intoxicating liquor for

consumption off premises. Brief of Appellant at 41. Her statutory argument is based not on the language of the statute but on her contention that the language of the statute should be altered by the Court to modify or strike words Appellant contends were improvidently inserted or to supply missing words to the statute. Brief of Appellant at 41. As she states, "The Court may reword Subsection 2 of the 2002 Act without disturbing the legislative intent to limit liability for sales to adults the sellers can observe, while reinforcing the specific protections for minors." Brief of Appellant at 44 (emphasis added). Appellant also goes on to propose to the Court how it should re-write the section, concluding that its proposed language more effectively addresses the problem of under-age drinking and driving than does the language the Legislature chose. Brief of Appellant at 45. The essence of Appellant's argument is to be found in the final sentence of her argument on this point: "In sum, this rewording allows society to counter Huck's illegal conduct with every weapon in the law's arsenal." Brief of Appellant at 45.

The primary rule of statutory construction is to determine the true intent of the Legislature, giving a statute a reasonable interpretation in light of that intent. Acme Royalty Co. v. Director of Revenue, 96 S.W.3d 72, 74 (Mo. banc 2002). Courts ascertain the intent of the legislature from the plain language used, State ex rel. Golden v. Crawford, 165 S.W.3d 147, 148 (Mo. Banc 2005), and must interpret the statute to subserve the legislative intent, rather than subvert it. Elrod

v. Treasurer of Missouri as Custodian of Second Injury Fund, 138 S.W.3d 714, 716 (Mo. banc 2004). Construction of a statute is not a matter of judicial discretion and a court should not undertake to substitute its judgment for that of the Legislature in giving meaning to a statute. Eckenrode v. Director of Revenue, 994 S.W.2d 583, 585 (Mo. App. 1999). Further, courts cannot add words to a statute under the auspices of construing the statute, particularly when the language of the statute is itself plain and clear. Southwestern Bell YellowPages, Inc. v. Director of Revenue, 94 S.W.3d 388, 390 (Mo. banc 2002).

Appellant is asking the Court to ignore every one of the foregoing maxims of statutory construction and to re-write § 537.053 to adopt a policy that goes beyond what the Legislature designed and intended for dealing with dram shop liability. What she fails to perceive, and what the Court must not ignore, is that the Legislature has designed a policy and has made conscious, deliberate choices about the scope and extent of that policy. Those conscious, deliberate choices reflect the Legislature's determination of how various interests affected by the legislation are to be balanced. In framing § 537.053 in the manner in which it has, the Legislature has simply acted consistent with what the courts have recognized as the Legislature's realm of action:

> The legislature is better equipped to deal with myriad considerations. The political machinery of the legislature has the requisite sophisticated tools for

> gathering data, conducting studies, receiving public opinion, and, finally, implementing the policy in carefully expressed and well-defined legislation. The difficulties in: (1) classification of business vendors and social hosts; (2) recognition of intoxication; (3) predictability of the conduct of an intoxicated person; (4) imposition of a duty of inquiry upon social hosts; and (5) the spread of the cost of liability are additional arguments persuading us to defer decisionmaking to the legislature.

Harriman v. Smith, 697 S.W.2d 219, 221-22 (Mo. Ct. App. 1985).

As the last sentence of Appellant's argument shows, Appellant's bone of contention with § 537.053 is with the choices that the Legislature made and the balance it sought to achieve between the interests impacted by the statute. Her recourse, under the circumstances, is with the Legislature and it is to that body that she should look to achieve a different balance, not the courts. The language of § 537.053 is clear and unambiguous. The cause of action it creates is against those liquor licensees who sell and serve alcohol for consumption on the premises. § 537.053.2, RSMo. No such cause of action is created for those licensees, such as convenience stores, grocery stores and drug stores which sell alcoholic beverages for consumption off the premises. Id. *See, also,* Lambing v. Southland Corporation, 739 S.W.2d 717, 719-20 (Mo. banc 1987).

II.

SECTION 573.053, RSMO., COMPLIES WITH THE EQUAL PROTECTION AND OPEN COURTS CLAUSES OF THE MISSOURI CONSTITUTION, MO. CONST. ART. I, SECTION 2 AND 14 (RESPONDS TO SECTION IV A&B OF APPELLANT'S BRIEF)

(Responds to Section IV A & B of Appellant's Brief)

In Sections A and B of her brief, Appellant argues for the invalidity of § 537.053 on the basis of the Equal Protection and Open Courts clauses in the Missouri Constitution. The essence of Appellant's argument on both these challenges is the distinction the statute draws between liquor licensees who sell and serve intoxicating liquor for consumption on the premises and those licensees who sell intoxicating liquor for consumption off-premises. She argues that this statutory distinction is arbitrary, unreasonable and irrational where the Open Courts clause is concerned and that it is also arbitrary, unreasonable and without a rational basis where the Equal Protection clause is concerned. Brief of Appellant, Section A & B. As noted in the first point of this brief, § 537.053 reflects a conscious, deliberate choice on what the State's policy will be with respect to dram shop liability. Under either the Open Courts clause or the Equal Protection clause this appeal is about whether the Legislature could design a policy for dram shop

liability that balances the interests involved while distinguishing between the two types of licensees.

A.

As an initial matter, under the Open Courts clause, Mo. Const. Art. I, § 14, it is unnecessary to address the distinction between licensees who sell and serve intoxicating liquor for consumption on the premises and those who don't. Analysis of an Open Courts clause challenge involves a three-part test: (1) a party must show that a recognized cause of action exists, (2) that the cause of action is being restricted, and (3) that the restriction is unreasonable and arbitrary when balanced against the purpose and basis for the legislation. Kilmer v. Mun, 17 S.W.3d 545, 549-50 (Mo. banc 2000). Only if the statute under consideration includes a barrier "for seeking a remedy for a recognized injury" is it necessary to ask whether that barrier is arbitrary or unreasonable. *Id.* at 550. As the Court's analysis makes clear, the barrier is something that is independent of the substance of the cause of action. In *Kilmer*, this something was an independent action by a prosecutor that was unrelated to the underlying cause of action. The barrier in *Kilmer* did not define who could sue, who could be sued, the duty the latter owed to the former, the types of injuries that could be sued for, or the types and amounts of damages that could be recovered. The prosecutor's decision to prosecute or not prosecute, and the outcome of that prosecution, were procedural impediments to what was

already a completed set of facts that came within the statute's substantive definition of a cause of action.

Importantly for the Open Courts clause challenge presented here, this Court has recognized that it is "the power of the legislature to 'design the framework of the substantive law' by abolishing or modifying common law or statutorily based claims, yet keeping a meaningful right to a 'certain remedy' where the law recognizes a cause of action." Id. at 550 (emphasis added). The Open Courts clause is not concerned with whether the Legislature can create causes of action or amend the common law or statutory causes of action. Its only concern is with the validity of barriers or restrictions for seeking redress in the courts for a cause of action already recognized.

When the Open Courts clause analysis is properly considered, it becomes clear that Appellant's argument is misplaced. She focuses on the substance of the cause of action defined by the Legislature in § 537.053. She does not, and cannot, point to any barrier in § 537.053 that is independent of the cause of action the Legislature has defined. Indeed, as the language of § 537.053 shows, her challenge is not to any language in the statute which creates a barrier against access to the courts but to the omission of language which would entitle her to sue: "any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink for consumption on the premises[.]" Her challenge

is based on the absence of language relating to the sale of intoxicating liquor in the original package not to be consumed upon the premises from the statutorily-defined cause of action. The Open Courts clause challenge as expressed by Appellant highlights what was pointed out in the argument above on statutory construction – Appellant disagrees with the policy choices made by the Legislature with respect to the question of dram shop liability, specifically that in defining the scope of that liability as a cause of action, the Legislature did not take the extra step of creating a cause of action that would fit her circumstances. The Court has recognized that the Open Courts clause is concerned with barriers, restrictions and recognized legal injuries. Etling v. Westport Heating & Cooling Services, Inc., 92 S.W.3d 771, 773 (Mo. banc 2003). It is not a mandate that the Legislature (or the common law) create a right to sue against any potential defendant or accord any potential plaintiff a recovery. Id.

B.

In addressing Appellant's contentions concerning the alleged arbitrary and unreasonable nature of § 537.053, it is useful to consider principles enunciated with respect to the Equal Protection clause. Dram shop liability statutes constitute a "legislative plan call[ing] for a carefully limited class of persons to whom recovery rights were given." Fuhrman v. Total Petroleum, Inc., 398 N.W.2d 807, 810 (Iowa 1987)(Iowa statute distinguished between liquor by the drink and

package liquor stores). In undertaking to address a particular problem through legislation, it is not necessary that the legislature address all potential evils or none at all – it is free to do so incrementally. Kelly v. Sinclair Oil Corp., 476 N.W.2d 341, 347 (Iowa 1991), *citing* Ry. Express Agency v. New York, 336 U.S. 106, 110, 69 S. Ct. 463, 466 (1949). As observed by the Supreme Court of Wyoming, "the legislature must be allowed leeway to approach a perceived mischief incrementally." Greenwalt v. Ram Restaurant Corp., 71 P.3d 717, 731 (Wyo. 2003). Arbitrariness, reasonableness and rational basis are not judged by the scope of what could have been enacted. Id. at 730 ("Equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices and line-drawing"). They are judged by the scope of what was enacted and the relationship of the contents to the governmental interest to be served. Because legislatures are not left with an all-or-nothing choice under the Equal Protection clause, the questions of arbitrariness, reasonableness and rational basis are judged from the standpoint of whether "the challenged law operates equally upon those persons or classes of persons intended to be affected as a result of a valid exercise of the legislature's lawmaking power." Kelly, 476 N.W.2d at 347 (emphasis added). The question, then, is whether the evil sought to be addressed by § 573.053 is furthered by imposing dram shop liability on those liquor licensees which sell liquor by the drink for consumption on the premises. Clearly it does.

In fact, the Appellant does not contest the rational relationship between what is actually included in § 573.053 and the problem it seeks to address. Her concern is with the line the Legislature chose to draw and its failure to include language in its statute that would have created a cause of action that covered her circumstances. In designing its system for dealing with dram shop liability, the line drawn by the Legislature separates those licensees which sell liquor by the drink for consumption on the premises and those that sell liquor in its original package for consumption elsewhere. This distinction is one rooted in the realities of the liquor trade – "As a practical matter, a patron wishing to obtain alcohol can do so in only one of two ways: by purchasing it for on-premises consumption or by purchasing it for off-premises consumption." Kelly, 476 N.W.2d at 347. This distinction is also one rooted in Missouri regulation of sales of intoxicating liquors. The liquor licensing statutes are organized and divided between those licensees who sell "liquor by the drink at retail for consumption on the premises," *see, e.g.*, §§ 311.085, 311.100, 311.090, 311.091, 311.092, 311.095, 311.096, 311.097, 311.098, 311.100 and 311.102, RSMo., and those who sell "intoxicating liquor in the original package, not to be consumed upon the premises where sold." § 311.200, RSMo. Missouri has traditionally treated the two separately for purposes of regulation.

As the requirements for licensees which sell "intoxicating liquor in the original package, not to be consumed upon the premises where sold" show, the Legislature understood that the licensee selling package liquor for consumption off-premises was to be something more than just a purveyor of alcoholic beverages. Licenses for such establishments could only be issued to "a person engaged in, and to be used in connection with, the operation of one or more of the following businesses: a drug store, a cigar and tobacco store, a grocery store, a general merchandise store, a confectionary or delicatessen store, nor to any such person who does not have and keep in his store a stock of goods having a value according to invoices of at least one thousand dollars, exclusive of fixtures and intoxicating liquors." § 311.200.1, RSMo. Licensees selling intoxicating liquor for consumption off the premises come in a wide variety of types, most of which do not sell liquor as their principal item of business, and many of which also limit the type of alcoholic beverage they sell. In this latter regard, only 35 percent of convenience stores sell wine and only 17 percent sell packaged liquor. *Beer Sales at Convenience Stores*, National Association of Convenience Stores, http://www.nacsonline.com/NACS/Resource/PRToolkit/FactSheets/prtk_fact_beer.htm. In terms of purchases of beer for consumption off-premises, consumers purchased beer most often at supermarkets and grocery stores (40.2 %), followed by liquor stores (24.9%) and then convenience stores (23.1%). Id. The point to be

taken from these figures is that in drawing the lines where it did in creating its dram shop liability cause of action, the Legislature could conclude there is a distinction to be drawn between the type of business which sells liquor by the drink for consumption on the premises and package liquor for consumption off-premises based, in part, on the make-up of their stock-in-trade.

More fundamentally, there is also the factor identified by the Iowa Supreme Court that distinguishes the two types of licensees:

> "[W]here alcohol is served for on-premises consumption it is consumed in the permittee's or licensee's facilities where the permittee or licensee owner or employee have the opportunity to observe their patrons' consumption and behavior. . . .
>
> Furthermore, permittees and licensees who sell alcohol exclusively for off-premises consumption have no control over their patrons once those patrons make their purchases and leave the premises. Although some of those patrons may purchase alcohol for immediate consumption, many of those patrons often purchase it intending to consume it at some time in the future. The legislature thus could have concluded that the purposes of the dramshop act would not be furthered by imposing upon such permittees and licensees a standard of care equivalent to that imposed upon permittees and licensees that both sell and serve alcohol for off-premises consumption.

Kelly, 476 N.W.2d at 348. The seller of package liquor for consumption off-premises is dealing with a single point of sale and must make judgments and decisions (including judgments and decisions about the age of the patron) within the context of that limited contact and timeframe. The seller of liquor by the drink for consumption on the premises is afforded a greater number of contacts and period of time in which to make such judgments.

The quote from *Kelly* above also highlights that in developing a statutory cause of action for dram shop liability, the Legislature is stating a standard of care and assigning responsibility among the various parties involved. *See, also,* Greenwalt, 71 P.3d at 737 (classifications inherent in dram shop liability statutes clearly revolve around the traditional policy considerations driving definitions of duty, breach of duty, proximate cause and damages). In doing so, it considers and balances a myriad of factors, including distinctions between the types of vendors involved, the ability to recognize intoxication or predict the conduct of the person purchasing alcohol, the level of duty of inquiry to be imposed, the ability to spread costs and judgments about effectiveness of measures relative to their costs. Harriman, 697 at 221-22.

Another factor that the Legislature can consider in designing the state's doctrine of dram shop liability is the degree of simplicity or complexity of the cause of action it creates and concomitant issues of proof, what *Greenwalt* refers to

as a "simple-to administer tort claim." 71 P.3d at 738. As the quote from *Kelly* above illustrates, the issues of causation, foreseeability and breach of duty are much less clear-cut in the single point-of-sale encounter by the seller of packaged liquor for consumption off the premises. 476 N.W.2d at 348. Issues of when the purchased liquor was consumed, where it was consumed and what other events intervened are much more complex and more susceptible to the passions of the jury when the liquor is purchased for consumption off the premises and the buyer leaves the store without having consumed the liquor than when the patron has consumed the intoxicating liquors on the premises in the presence of the licensee and leaves the licensee's establishment immediately after that consumption. In deciding what a dram shop liability cause of action might look like, the Legislature can take into consideration how the traditional elements of a cause of action might be implicated by and applied to different potential defendants. Greenwalt, 71 P.3d at 737.

Finally, in adopting its policies in this area, the Legislature may choose to do so through a variety of criminal, administrative and civil liability means. *See, e.g.,* Sigman v. Seafood Limited Partnership, 817 P.2d 527, 533 & n 4 (Colo. banc 1991). In developing this system, the Legislature can decide to address the problem through civil liability for some involved and criminal or administrative liability for others. Id. It can also decide that, in some instances, the total burden

of responsibility will be placed on the person consuming the alcohol. Id. Such an action is determined to further promote the legislative purpose by establishing an additional deterrence to overindulgence. Id. As a policy matter expressed in its legislation, this is exactly what the Legislature has done. It has determined that, as a system for dealing with the problem of drinking and driving, deterrence is to be achieved by the zero tolerance laws applicable to under-age drinkers and not by imposing civil liability on the seller of package liquor for consumption off-premises.

Even if the classification drawn by § 573.053 was determined to be between classes of under-age drinkers, this does not violate either the Open Courts or Equal Protection clauses. Fuller v. Maxus Energy Corp., 841 S.W.2d 881, 885 (Tex. Ct. App. 1992)(dram shop liability of vendor for sale to under-age drinker depended on age of under-age drinker to whom sale was made). In adopting a dram shop liability policy, a legislature can determine that the under-age drinker, although under the legal age for drinking, does possess the maturity and understanding of right and wrong to be held responsible for his or her actions. Id. In other words, the limitation on drinking age is not a legal rule of mental incompetency. Similarly, the legislature can determine that when the under-age drinker is able to obtain alcohol at an establishment selling package liquor for consumption off-premises that he or she still has the maturity and sense of right and wrong to make

the choice as to where he or she will consume that alcohol and that responsibility for that choice should rest with the under-age drinker. This is what distinguishes the liquor by the drink establishment from the packaged liquor establishment. At the liquor by the drink establishment the fateful choice between responsible behavior and irresponsible behavior is made on the premises and in the presence of the vendor or its employees. It is the ability of the liquor by the drink licensee to still intervene after the under-age drinker has voluntarily chosen to not drink responsibly which forms the basis of imposing civil liability on it, an opportunity lacking in the case of the packaged liquor licensee.

In this action, the Appellant challenges the policy adopted by the Legislature – the lines it drew and the choices it made in creating a dram shop liability cause of action. Appellant faults the Legislature for not going as far as she might have gone if it had been in her power to impose a rule of liability on the subject. That the Legislature might not have gone as far as she would have, or that it might have determined to address the problem with a different mix of measures, does not make its action constitutionally infirm. The Legislature was free to consider the types of vendors of intoxicating liquors, the nature of their trade, the interactions those vendors had with their customers, the ability to control when and where the customers consumed the liquor sold and their actions immediately following the consumption, how responsibility should be assigned between the consumer of

alcoholic beverages and the seller of alcoholic beverages, and what type and mix of counter-measures (criminal, administrative and civil liability) best balanced the interests of all those involved. As was noted in *Harriman*, "The legislature is better equipped to deal with myriad considerations. The political machinery of the legislature has the requisite sophisticated tools for gathering data, conducting studies, receiving public opinion, and, finally, implementing the policy in carefully expressed and well-defined legislation." 697 S.W.2d at 221-22

CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 5,201 words, as calculated by counsel's word processing program;

(B) A copy of this Brief is on the attached 3 1/2" disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

_____

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Amicus Curiae were sent U.S. Mail, postage prepaid, to the following parties of record on this 14th day of August, 2004:

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